

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAPOLEAN WATKINS,

Defendant-Appellant.

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UNPUBLISHED

April 29, 2008

No. 276820

Oakland Circuit Court

LC No. 2005-203703-FC

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of 10-1/2 to 30 years. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant came into the complainant's gas station, grabbed five or six pairs of socks, and headed for the door. The complainant followed and asked where defendant was going. As defendant backed out of the door, he said, "Come and get it," lifted his shirt, and showed the handle of a gun at his waistband. The complainant retreated and locked the door behind the cash register. Interrupted by a phone call from his wife, the complainant did not call the police. This incident was recorded by four cameras, and a videotape was played for the jury. Later on the day of the incident, the complainant observed defendant and a companion at the station and yelled at him to leave. A station employee called the police. A responding police officer arrested defendant and another man as they were walking in the area. Each man was carrying a BB gun that appeared to be a black semi-automatic handgun. The defense conceded that defendant stole the socks, but argued that the complainant did not see a gun or was not placed in fear.

On appeal, defendant argues that the prosecutor engaged in misconduct by repeatedly asking leading questions of his witnesses. Defendant did not preserve this issue by objecting to the questions at trial. Unpreserved issues of prosecutorial misconduct are reviewed under the plain error test of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." MRE 611(c)(1). In this instance, the prosecutor used leading questions with respect to matters of little or no significance to the critical issue at trial, i.e., whether defendant displayed a gun. Because the record does not show a plain

error affecting defendant's substantial rights, reversal is not required. See *People v Watson*, 245 Mich App 572, 587-588; 629 NW2d 411 (2001).

Defendant also argues that trial counsel was ineffective for failing to object to the leading questions.

To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.*, pp 302-303 (citations and internal quotation marks omitted).

Counsel's failure to object to questioning that was technically leading, but not damaging to the defense theory, may have been a strategic decision. See *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995). In any event, we are not persuaded that there is a reasonable probability of a different result at trial had counsel objected to the innocuous questioning.

Affirmed.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey